

No. 16459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH MEYER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Vensep, Inc.,
etc., Bankrupt, and DIVISION OF LABOR LAW ENFORCEMENT,
Appellees.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Vensep, Inc.,
Bankrupt,

Appellant,

vs.

RALPH MEYER,

Appellee.

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS.

QUITTNER, STUTMAN & TREISTER,

639 South Spring Street,
Los Angeles 14, California,
Attorneys for Irving I. Bass.

PAULINE NIGHTINGALE,
CONRAD LEE KLEIN, and
JOSEPH ABIHIDER,

405 State Building,
Los Angeles 12, California,
Attorneys for Division of Labor Law Enforcement.

FILED

SEP 28 1959

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Specification of error.....	1
Jurisdiction	2
Facts	2
State statutes involved.....	3
Issues presented	5
Argument	6

I.

Appellant's petition for review of the referee's order of October 23, 1958, being untimely, should not have been entertained	6
--	---

II.

The liquor license of Vensep, Inc., was property which became an asset of the assignee's estate subject to the lien for wages	7
---	---

III.

Payment by the assignee of state taxes from funds impressed by prior wage liens is contrary to law.....	10
---	----

IV.

California Business and Professions Code, Section 24049, is not controlling.....	11
--	----

V.

The priority statutes are special and control the general provision of Section 24049 of the Business and Professions Code	13
---	----

VI.

As of May 29, 1957, the claims of the Department of Employment and Board of Equalization together with the assignee's right to fees and reimbursement of expenses were inferior to the claims of the United States and the employees of Vensep, Inc..... 14

VII.

With the advent of bankruptcy the trustee succeeded to the lien rights of the Vensep employees who, in turn, by virtue of the bankruptcy, secured a higher priority position than that of the United States..... 15

VIII.

The employees of Vensep, Inc., were substantially prejudiced by the assignee's disbursements..... 17

IX.

The trustee in bankruptcy would have secured a maximum return for the on-sale liquor license of Vensep, Inc..... 19

X.

The assignee was remiss in the administration of his trust and is therefore subject to a surcharge..... 21

XI.

Since an assignee voluntarily assumes to act there is no inequity in denying him compensation and reimbursement of expenses where the estate is insufficient to support said payments 24

Conclusion 25

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bookey v. King, 236 F. 2d 871.....	6
Brainard v. Fitzgerald, 3 Cal. 2d 157.....	21
California Drive-In Restaurant Assn. v. Clark, 22 Cal. 2d 287....	11
Covert v. State Board of Equalization, 29 Cal. 2d 125.....	22
Division of Labor Law Enforcement v. Moroney, 28 Cal. 2d 344	13
Division of Labor Law Enforcement v. Stanley Restaurants, 228 F. 2d 420.....	14, 16, 24
Doggender v. Seattle Brewing and Malting Co., 41 Wash. 385, 83 Pac. 898, 4 L. R. A. (N. S.) 626.....	7
Etchart v. Pyles, 106 Cal. App. 2d 549.....	7
Fisher v. Cushman, 103 Fed. 860, 51 L. R. A. 292.....	9
Fuetl, In re, 247 Fed. 829.....	9
Golden v. State of California, 133 Cal. App. 2d 640.....	7, 9, 11
Harrison, Estate of, 110 Cal. App. 2d 717.....	11
Irvine v. State Board of Equalization, 40 Cal. App. 2d 280.....	22
Jaffee v. Pac. Brewing and Malting Co., 69 Wash. 308, 124 Pac. 1122	7
Mollis v. Jiffy-Stitcher Co., 125 Cal. App. 2d 236.....	7
Pehau v. Stewart, 112 Cal. App. 2d 90.....	11
Penziner v. West American Finance Co., 10 Cal. 2d 160.....	11, 12
People v. Jemenez, 49 Cal. App. 2d Supp. 739.....	20
People v. Platt, 67 Cal. 21.....	12
Quaker Room, In re, 90 Fed. Supp. 758.....	7, 9
Robinson, In re, 42 Fed. Supp. 342.....	7
Roehm v. County of Orange, 32 Cal. 2d 280.....	9
Rowe v. Colpoys, 137 F. 2d 249, 148 A. L. R. 488.....	8
Sadler, In re, 104 Fed. Supp. 886.....	6
Stallinger v. Goss, 193 P. 2d 810.....	8
State of Oregon v. Ingram, 63 F. 2d 417.....	18

	PAGE
Tyne, <i>In re</i> , 261 F. 2d 249.....	6
United States v. Division of Labor Law Enforcement, 201 F. 2d 857	15

STATUTES

Bankruptcy Act, Sec. 2a(21).....	18, 22
Bankruptcy Act, Sec. 24a.....	2
Bankruptcy Act, Sec. 39c.....	6
Bankruptcy Act, Sec. 64a(2)	16, 19, 24
Bankruptcy Act, Sec. 64a(4)	16, 19, 24
Bankruptcy Act, Sec. 67c(2)	16, 17, 20
Business and Professions Code, Sec. 23049.....	19
Business and Professions Code, Sec. 24049	3, 10, 11, 12, 13, 20
Business and Professions Code, Sec. 24070.....	7
California Constitution, Art. XX, Sec. 22.....	19
Code of Civil Procedure, Sec. 1204.....	3, 10, 14, 16, 17, 20, 21
Code of Civil Procedure, Sec. 1963(15)	22
Government Code, Sec. 11523.....	22
Revenue and Taxation Code, Sec. 6756	
.....	4, 10, 11, 12, 13, 14, 16, 20, 21
Unemployment Insurance Code, Sec. 1701.....	4
Unemployment Insurance Code, Sec. 1702.....	
.....	4, 10, 11, 12, 13, 14, 20, 21
United States Code, Title 11, Sec. 47a.....	2
United States Code Annotated, Title 31, Sec. 191.....	15, 21, 24
United States Code Annotated, Title 31, Sec. 192.....	15
United States Revised Statutes, Sec. 3466.....	15, 16, 18, 21, 24
United States Revised Statutes, Sec. 3467.....	15

TEXTBOOKS

Burrill, <i>Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors</i> , p. 504.....	22, 23
3 Collier on Bankruptcy, Sec. 64.502.....	16, 18
33 Opinions of the California Attorney General, p. 140 (June 9, 1959)	8
63 Yale Law Journal, p. 903, Kennedy, <i>The Relative Priority of the Federal Government</i> , etc.....	15

No. 16459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RALPH MEYER,

Appellant,

vs.

IRVING I. BASS, Trustee in Bankruptcy of the Estate of
Vensep, Inc., etc., Bankrupt, and DIVISION OF LABOR
LAW ENFORCEMENT,

Appellees,

IRVING I. BASS, Trustee in Bankruptcy of the Estate of
Vensep, Inc., Bankrupt,

Appellant,

vs.

RALPH MEYER,

Appellee.

REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS.

Specification of Error.

1. That the Court erred in denying the Trustee's motion to dismiss the petition for review filed by Appellant herein seeking a review of the Referee's Order of October 23, 1958. [Tr. of R. p. 61.]

Jurisdiction.

Appellate jurisdiction over the instant matters exists by virtue of the provisions of Section 24a of the Bankruptcy Act (11 U. S. C. Sec. 47a).

Facts.

The material facts set forth in Appellant's Opening Brief are not controverted. Reference is made herein only to those facts which relate to the question of the timely filing of the petition for review filed by Appellant from the Referee's Order of October 23, 1958.

The Order of the Referee surcharging Meyer in the sum of \$4,437.40 was entered on October 23, 1958. [Tr. of R. p. 39.] Meyer did not file his petition for review with the Referee until November 24, 1958 [Tr. of R. p. 29], some thirty-two days after the entry of the Referee's Order. On said 24th day of November, 1958, Meyer additionally filed a petition with the Referee seeking an extension of time for his filing of a petition for review. [Tr. of R. p. 46.] Meyer's petition for an extension of time was denied by the Referee. [Tr. of R. p. 46.] The Trustee moved the District Judge to dismiss Appellant's petition for review on the ground that it was not timely filed. [Tr. of R. p. 56.] In his Order of March 27, 1959, the District Judge denied the Trustee's motion. [Tr. of R. p. 61.]

State Statutes Involved.

California Code of Civil Procedure, Section 1204

“When any assignment, whether voluntarily or involuntarily, or whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency . . . commenced against him, or when any property is turned over to the creditors of a person . . . or trustee for the benefit of creditors, the wages and salaries of . . . servants, clerks, laborers, and other persons, for personal services rendered such assignor . . . within 90 days prior to such assignment, or the taking over of such property . . . and not exceeding six hundred dollars (\$600) each, constitute preferred claims and liens as between creditors of the debtor, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor . . . whose property is so turned over. . . . The trustee . . . or assignee for the benefit of creditors shall have the right to require sworn claims to be presented. . . .”

California Business and Professions Code, Section 24049

“The department may refuse the renewal or transfer of any license when the applicant is delinquent in the payment of any taxes due under the Alcoholic Beverage Tax Law, the Sales and Use Tax Law, the Personal Income Tax Law, or the Bank and Corporation Tax Law, which such tax liability arises in full or in part out of the exercise of the privilege of an alcoholic beverage license, or any amount due under the Unemployment Insurance Code

when such liability arises out of the conduct of a business licensed by the Department of Alcoholic Beverage Control.”

California Unemployment Insurance Code, Section 1701

“The wage earner and employer contributions required to be paid by any employing unit under this division, together with interest and penalties, shall be satisfied first in any of the following cases:

(a) Whenever the employing unit is insolvent.

(b) Whenever the employing unit makes a voluntary assignment of its assets. . . .”

California Unemployment Insurance Code, Section 1702

“Section 1701 does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid became a lien and the preference given to the State by that section is subordinate to the preferences given to claims for personal services by Sections 1204 and 1206 of the Code of Civil Procedure.”

California Revenue and Taxation Code, Section 6756

“The amounts required to be paid by any person under this part together with interest and penalties shall be satisfied first in any of the following cases:

(a) Whenever the person is involent.

(b) Whenever the person makes a voluntary assignment of his assets.

(c) Whenever the estate of the person in the hands of executors, administrators, or heirs is insufficient to pay all the debts due from the deceased.

(d) Whenever the estate and effects of an absconding, concealed, or absent person required to pay any amount under this part are levied upon by process of law.

This section does not give the State a preference over any recorded lien which attached prior to the date when the amounts required to be paid became a lien.

The preference given to the State by this section shall be subordinate to the preferences given to claims for personal services by Sections 1204 and 1206 of the Code of Civil Procedure.”

Issues Presented.

1. May the Bankruptcy Court entertain a petition for review of an order of the Referee which is filed more than ten days after the entry of that order where no extension for said late filing has been granted by the Referee?

2. Were payments made by the Assignee to the California Department of Employment and Board of Equalization in connection with his transfer of a liquor license proper in view of the existence of wage liens which by statute are superior to the obligations owing by the Assignor to the Department of Employment and Board of Equalization?

3. Was the Assignee entitled to pay himself a fee and reimburse himself for expenses incurred during his administration where the employees of the Assignor have prior unsatisfied wage lien claims which exceed in amount the totality of the assignment assets?

ARGUMENT.

I.

Appellant's Petition for Review of the Referee's Order of October 23, 1958, Being Untimely, Should Not Have Been Entertained.

Section 39c of the Bankruptcy Act dealing with the review of a referee's order provides as follows:

“A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge . . .”

While there are decisions to the effect that the ten day review limitation applies only to the person aggrieved by the referee's order and does not bar the bankruptcy court from hearing the review even after the expiration of the ten day period for good cause shown, the most recent expression of this Court has been that filing within the ten day period is imperative. *Bookey v. King*, 236 F. 2d 871. This decision has been cited with approval by the Seventh Circuit in the recent case of *In re Tyne*, 261 F. 2d 249.

It is submitted that even if the District Court has the discretion to entertain a petition for review filed more than ten days after the entry of the order sought to be reviewed, such discretion should not be exercised save upon the demonstration by the petitioner on review of substantial justification for his laches. *In re Sadler*, 104 Fed. Supp. 886. The reasons set forth by Appellant in his petition for an extension filed with the Referee [Tr. of R. pp. 45-46] do not in any manner whatsoever fur-

nish justification for the entertainment of his untimely petition for review.

“It is the duty of counsel to examine the record in a case himself. . . . Neglect of this duty is no excuse for delay in filing a petition.” *In re Robinson*, 42 Fed. Supp. 342.

II.

The Liquor License of Vensep, Inc. Was Property Which Became an Asset of the Assignee's Estate Subject to the Lien for Wages.

The Appellant Meyer contends that the liquor license of the Bankrupt was not property and never became an asset of the insolvent estate of the Assignee. (Opening Brief of Appellant, pp. 26, 27.) This contention is contrary to the California law where it is now well settled that a liquor license is property.

In re Quaker Room, 90 Fed. Supp. 758;

Golden v. State of California, 133 Cal. App. 2d 640;

Etchart v. Pyles, 106 Cal. App. 2d 549.

Although a liquor license is merely a privilege so far as the relations between the licensee and the state are concerned, it is property in any relationship between the license and third persons because the license, being transferable under Section 24070 of the Business and Professions Code, has value and may be sold.

Mollis v. Jiffy-Stitcher Co., 125 Cal. App. 2d 236;

Doggender v. Seattle Brewing and Malting Co.,
41 Wash. 385, 83 Pac. 898; 4 L. R. A. N. S.,
626, 628;

Jaffe v. Pac. Brewing and Malting Co., 69 Wash.
308, 124 Pac. 1122.

A liquor license that is transferable has been held to be property subject to execution and attachment if local law provides a statutory procedure therefor.

Rowe v. Colpoys, 137 F. 2d 249, 148 A. L. R. 488, 492;

Stallinger v. Goss (Mont.), 193 P. 2d 810.

In this connection, the California Attorney General in a well considered recent opinion at 33 Ops. Cal. Atty. Gen. 140 (June 9, 1959), ruled that liquor licenses are property subject to attachment and execution. In reaching this conclusion, the Attorney General examined numerous authorities cited therein, and stated in part as follows:

“It is common knowledge, however, that liquor licenses are bought and sold in the open market. (*Mollis v. Jiffy-Stitcher Co.*, 125 Cal. App. 2d 236, 238.) For this reason the courts have, where the licensee and a party other than the licensing agency were involved, considered such licenses to be property. *Roehm v. County of Orange*, 32 Cal. 2d 280; *Golden v. State of California*, 133 Cal. App. 2d 640; and *In re Quaker Room*, 90 Fed. Supp. 758. In the *Roehm* case the California Supreme Court held that liquor licenses are not subject to *ad valorem* taxation as personal property because they are not included in the list of taxable intangibles specified in article XIII, section 14 of the California Constitution and section 111 of the Revenue and Taxation Code. Implicit in the opinion is the premise that liquor licenses are intangible property. In the *Golden* case, the court held that a license was property as that term is used in 26 U. S. C. sec. 3670, which gives the federal government a lien for taxes ‘upon

all property and rights to property, whether real or personal, belonging to such person.' And in the case of *In re Quaker Room*, the court held that a California liquor license was property as that term is used in the Bankruptcy Act. The court therein referred to the decisions refusing to classify a license as property for purposes of the due process clause as being a 'characterization for . . . a limited purpose.' The courts in the last two cases emphasized the fact that liquor licenses are transferable under the Alcoholic Beverage Control Act (secs. 24070 to 24076 Bus. & Prof. Code)."

A liquor license is also regarded as property that passes to the trustee in bankruptcy.

In re Fuettl, 247 Fed. 829;

Fisher v. Cushman, 103 Fed. 860, 51 L. R. A. 292;

In re Quaker Room, 90 Fed. Supp. 758.

The foregoing decisions recognize the principal that where a liquor license has a transferable value to the debtor as it does in California, it is property that in fairness ought to be within the reach of his creditors.

Roehm v. County of Orange, 32 Cal. 2d 280, 283.

There is no merit to the contention of the Appellant Meyer that the labor claims can only be asserted against the proceeds of the sale of the liquor license "after deducting the state taxes" (Opening Brief of Appellant, p. 25), which tax payments were made by the assignee in derogation of the wage liens as hereinafter discussed, *infra*. Just as the court in the *Golden* case, *supra*, pp. 645-646, held the proceeds from the liquor license to be property subject to a lien for federal taxes, the proceeds

in the sum of \$5,800.00 derived from the sale of the liquor license herein were subject to the wage liens arising under Section 1204 of the California Code of Civil Procedure.

It is interesting to note that Meyer considered the *full* selling price of the liquor license, namely, the sum of \$5,800.00 a part of the “*net* realization from liquidation of the assets” in computing his fee of \$423.70 being 6 per cent of such *net* proceeds (Opening Brief of Appellant, p. 5), which consisted of the sum of \$1,260.05 in addition to the proceeds from the liquor license. [Tr. of R. pp. 8, 9.] Yet Appellant Meyer would have the wage liens charged with the payment of the state tax claims, but not the assignee. This appellees submit, the court will not permit Meyer to do.

III.

Payment by the Assignee of State Taxes From Funds Impressed by Prior Wage Liens Is Contrary to Law.

The wage liens under Section 1204 of the California Code of Civil Procedure are expressly made paramount to the state tax claims paid by the assignee by Section 6756 of the California Revenue and Taxation Code and Section 1702 of the California Unemployment Insurance Code. In view of this explicit mandate, payment of the junior tax claims by Meyer was in derogation of the wage liens.

The fact that the California Department of Alcoholic Beverage Control under Section 24049 of the Business and Professions Code required payment of the state taxes as a condition precedent to the transfer of the liquor license did not warrant Meyer making such payments in derogation of the prior wage liens. Such an application of

the statute would constitute an unconstitutional impairment of a property right. In the case of *Golden v. State of California*, 133 Cal. App. 2d 640, 644, the court pointed out that the right to transfer a liquor license “enjoys constitutional immunity from legislative impairment.” Thus, a law prohibiting a liquor license from being pledged as a security could not be given a retroactive effect so as to impair a transfer of the license under a pledge agreement entered into prior to the enactment of the statute. *Pehau v. Stewart*, 112 Cal. App. 2d 90, 96.

IV.

California Business and Professions Code, Section 24049 Is Not Controlling.

The Appellant Meyer relies upon California Business and Professions Code, Section 24049 for the validity of tax payments made by him to the Department of Employment and Board of Equalization in derogation of the priority accorded wage liens over such taxes by Section 1702 of the California Unemployment Insurance Code, and Section 6756 of the California Revenue and Taxation Code. It is the contention of the Appellant that the afore-said Section 24049 repeals by implication the latter sections.

To overcome the presumption against repeals by implication the two acts must be irreconcilable, clearly repugnant and so inconsistent that they cannot have concurrent operation.

California Drive-In Restaurant Assn. v. Clark,
22 Cal. 2d 287, 292;

Penziner v. West American Finance Co., 10 Cal.
2d 160, 176;

Estate of Harrison, 110 Cal. App. 2d 717, 721.

Furthermore, in order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.

Penziner v. West American Finance Co., supra,
p. 176.

Applying the foregoing legal principles to the statutes involved herein, it is readily apparent that Business and Professions Code, Section 24049, does not in any manner revise, or even attempt to revise, the subject matter of Section 1702 and Section 6756, both of which sections are concerned only with priority status of taxes and wages where the debtor is insolvent or makes a voluntary assignment of assets as is involved in the instant case.

Section 24049 of the Business and Professions Code merely provides that the Department of Alcoholic Beverage Control may refuse the transfer of a liquor license when the applicant is delinquent in the payment of certain taxes. It is obviously not in *pari materia* with the statutes contained in the Unemployment Insurance Code and the Revenue and Taxation Code, the object of which statutes is to establish priorities in cases of insolvency.

It is necessary before the court may imply a repeal that the objects of the two statutes be the same. If they are not, both will stand though they may refer to the same subject.

People v. Platt, 67 Cal. 21.

V.

The Priority Statutes Are Special and Control the General Provision of Section 24049 of the Business and Professions Code.

The contention of Meyer that Section 24049 of the Business and Professions Code controls is based upon an erroneous premise that the said section is a special statute and that Section 1702 and Section 6756 are general. On the contrary, it would appear that the latter sections more readily fall within the class of special legislation treating as they do specifically of priorities in insolvency cases, while the former statute is concerned with tax payments in general.

Thus, in *Division of Labor Law Enforcement v. Moroney*, 28 Cal. 2d 344, the California Supreme Court held a statute to be general which required the payment of a court reporter's fee and specifically extended the requirement to the state and public officers, and therefore it was held not to control a *prior* enacted statute exempting a public officer, namely, the Division of Labor Law Enforcement from the payment of any court costs, such statute being held to be special.

Assuming *arguendo* that there is a conflict in the statutes, the special controls the general. Furthermore, it should be noted that Section 24049 of the Business and Professions Code is permissive whereas the priority statutes are mandatory. Under such circumstances it cannot be held to be the controlling statute.

VI.

As of May 29, 1957, the Claims of the Department of Employment and Board of Equalization Together With the Assignee's Right to Fees and Reimbursement of Expenses Were Inferior to the Claims of the United States and the Employees of Vensep, Inc.

On May 29, 1957, the date of its execution of a general assignment for the benefit of its creditors to Meyer, Vensep, Inc. was indebted to its former employees for wages earned within ninety days of the said assignment in the sum of \$7,662.85 and to the United States for taxes in the sum of approximately \$7,000.00. [Referee's Findings of Fact VI, Tr. of R. p. 42.]

Immediately upon the execution of the general assignment to Meyer, a lien arose upon the assigned assets in his possession in the sum of \$7,662.85 in favor of Vensep's former employees. California Code of Civil Procedure, Section 1204; *Division of Labor Law Enforcement v. Stanley Restaurants* (C. A. 9th) 228 F. 2d 420. This lien was prior in right to the obligations then owing by Vensep, Inc. to the Department of Employment and Board of Equalization. California Unemployment Insurance Code, Section 1702; California Revenue and Taxation Code, Section 6756.

Further, the Section 1204 lien was superior to the right of the Assignee to pay himself a fee and to reimburse himself for expenses incurred. *Division of Labor Law Enforcement v. Stanley Restaurants, supra*.

As of May 29, 1957, the United States was invested with a priority as against all of the assets of Vensep, Inc. in the hands of the Assignee, Meyer, by virtue of the approximately \$7,000.00 in taxes owing to it. Re-

vised Statutes, Section 3466 (U. S. C. A., Title 31, Sec. 191). Although the priority of the United States did not have lien status (Kennedy *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale Law Journal, p. 903 *et seq.*), it was superior in stature to the Section 1204 lien rights of the former employees of Vensep, Inc. *United States v. Division of Labor Law Enforcement*, 201 F. 2d 857.

Not only was the priority position accorded to the United States by Section 3466 superior to the Assignee's right to pay his fees and expenses, but when Meyer made such payments in derogation of this priority, he rendered himself personally liable to the United States. Revised Statutes, Section 3467 (U. S. C. A., Title 31, Sec. 192).

Thus, upon the execution of the assignment to Meyer on May 29, 1957, the obligations owing by Vensep, Inc. to the Department of Employment and Board of Equalization as well as Meyer's right to fees and reimbursement of expenses were clearly inferior to the lien rights of Vensep's employees which, in turn, at said date, were subordinate to the paramount priority of the United States.

VII.

With the Advent of Bankruptcy the Trustee Succeeded to the Lien Rights of the Vensep Employees Who, in Turn, by Virtue of the Bankruptcy, Secured a Higher Priority Position Than That of the United States.

With the filing of an involuntary petition in bankruptcy against Vensep, Inc. on July 17, 1957, [Referee's Findings of Fact II, Tr. of R. p. 40], the paramount priority of the United States against the funds in the

hands of the Assignee arising by virtue of Section 3466 terminated. 3 Collier on Bankruptcy, Section 64.502.

The advent of bankruptcy served to avoid the non-possessory lien given employees of Vensep, Inc. by Section 1204 of the Code of Civil Procedure. Section 67c(2), Bankruptcy Act. However, while the Section 1204 lien was invalidated by bankruptcy, it was capable of preservation by the Trustee for the benefit of the estate (Section 67c(2), Bankruptcy Act) and it was in fact so preserved. [Order of Referee re Objections to Assignee's Report and Account dated October 23, 1958, Tr. of R. p. 44].

By virtue of his preservation of the Section 1204 lien, the Trustee, as of the date of bankruptcy, had a specific charge against the funds in the hands of the Assignee which was superior to the claims of the Department of Employment and Board of Equalization as well as to the Assignee's right to fees and reimbursement of expenses. California Unemployment Insurance Code, Section 1702; California Revenue and Taxation Code, Section 6756; *Division of Labor Law Enforcement v. Stanley Restaurants, supra*.

Further, the inception of bankruptcy reversed the priority status which existed between the United States and employees of Vensep, Inc. during the course of the assignment and placed the wage indebtedness owing to said employees in a second priority position as contrasted with the fourth priority position enjoyed by the tax indebtedness to the United States. Sections 64a(2) and (4), Bankruptcy Act.

The employees of Vensep, Inc. acting through the Division of Labor Law Enforcement, filed their claims in these proceedings in the total sum of \$7,662.85 as prior wage claims under Section 64a(2) of the Bank-

ruptcy Act. [Petition re Objections to Report and Account of Assignee for Benefit of Creditors and for Order to Show Cause Thereon, Tr. of R. p. 23]. Appellant contends that the filing of an unsecured, though prior, claim in these proceedings by the Division of Labor Law Enforcement resulted in a waiver of the Section 1204 lien. (Opening Brief of Appellant, pp. 20-22).

This argument is untenable for the reason that it presupposes that with the advent of bankruptcy an employee has a valid lien for wages owing which he may choose to assert against the assets of the bankrupt estate. Bankruptcy serves to avoid the Section 1204 lien for wages subject only to the right accorded exclusively to the trustee to effect the lien's preservation for the benefit of the estate. Section 67c(2), Bankruptcy Act. Accordingly, when the Division of Labor Law Enforcement filed its proof of claim in these proceedings it had no lien status to assert and could only set forth a priority claim.

VIII.

The Employees of Vensep, Inc. Were Substantially Prejudiced by the Assignee's Disbursements.

Appellant argues that the employees of Vensep, Inc. suffered no prejudice by his disbursements due to the fact that the tax claim of the United States would have consumed the entirety of the assignment estate and left nothing for the employees. (Opening Brief of Appellant, pp. 17-18). Appellant's contention must be viewed with the knowledge that the assignment made to him was superseded by a bankruptcy proceeding filed within four months of the execution of the assignment. The assignment executed to Meyer on May 29, 1957, vested him with a

defeasible title to the assets of Vensep, Inc. which could become absolute only upon the non-intervention of a bankruptcy within four months from said date. *State of Oregon v. Ingram*, (C. A. 9th) 63 F. 2d 417.

“When the assignee takes charge of an assigned estate, he must be charged with knowledge that he is acting under an instrument which in and of itself constitutes an act of bankruptcy, and that, if bankruptcy proceedings are commenced within four months of the date of the assignment which result in adjudging his assignor a bankrupt, he, as the assignee, merely holds the assigned estate for the use and benefit of the creditors of the bankrupt, and that the bankruptcy court is the court which has the sole right and power to administer the estate.” *State of Oregon v. Ingram, supra*, at p. 422.

Accordingly, when Meyer accepted the assignment he became, for a four month period, subject, at his peril, to the distributive scheme of the Bankruptcy Act. *State of Oregon v. Ingram, supra*. With the superseding bankruptcy filed within four months of the making of the assignment, Meyer's actions from May 29, 1957, to July 17, 1957, and thereafter came within the scrutiny of the bankruptcy court, said court having the right to re-examine and determine the propriety and reasonableness of all disbursements made by him during said period and to surcharge him the amount of any disbursement determined by the court to have been improper or excessive. Section 2a(21), Bankruptcy Act.

By virtue of the superseding bankruptcy filed on July 17, 1957, and the resulting termination of the Section 3466 priority of the United States (3 Collier on Bankruptcy, Section 64.502), the obligations owing to the em-

ployees of Vensep, Inc. assumed a priority status higher than that of the United States. Sections 64a(2) and (4), Bankruptcy Act. The priority of the employees being greater than that of the United States, said employees, therefore, suffered very definite prejudice by virtue of Meyer's disbursements.

IX.

The Trustee in Bankruptcy Would Have Secured a Maximum Return for the On-Sale Liquor License of Vensep, Inc.

Appellant analogizes the liquor license of Vensep, Inc. to a membership in the stock exchange and argues that just as a bankruptcy trustee takes only the proceeds from a sale of the stock exchange membership remaining after deduction of dues owing to the exchange and debts owing to the exchange's members so also he takes only those proceeds from the sale of a liquor license which remain after payment of those sums which must be paid before a transfer of the license will be allowed. (Opening Brief of Appellant, pp. 24-25). In effect, Appellant is arguing that all that passes to a bankruptcy trustee from the sale of either a membership in the stock exchange or a liquor license is the equity remaining in either asset after the payment of the pre-existing conditions built into said assets by the agencies responsible for their creation.

The agency responsible for the creation of the liquor license is the State of California. California Constitution, Article XX, Section 22. The task of regulating the transfer of liquor licenses has been delegated by the State to the Department of Alcoholic Beverage Control (California Business and Professions Code, Section 23049 *et seq.*) subject to those terms and conditions which the

State chooses to impose. *People v. Jemencs*, 49 Cal. App. 2d Supp. 739. The State, speaking through California Business and Professions Code Section 24049, has given to the Department of Alcoholic Beverage Control the right to refuse the transfer of a liquor license when the applicant is delinquent in the payment of certain taxes or contributions. However the State has further spoken through Sections 1702 of the California Unemployment Insurance Code and 6756 of the California Revenue and Taxation Code and has thereby, in effect, told the Department of Alcoholic Beverage Control that where a Section 1204 lien exists in favor of an employee of the licensee, that lien is to take precedence over the licensee's obligation to the Department of Employment and Board of Equalization.

Assuming that Appellant's argument is sound and considering the worth of Vensep's liquor license to be the sum of \$5,800.00 [Referee's Findings of Fact III, Tr. of R. p. 41] and its lien obligations to its employees to be the sum of \$7,662.85 [Referee's Findings of Fact VI, Tr. of R. p. 42], it is apparent that the "pre-existing conditions" built into the liquor license of Vensep, Inc. by the State require payment of the totality of the license's selling price to the employee class. Since the lien in favor of employees for wages owing arises not only upon the execution of a general assignment but also upon the bankruptcy of the employer (California Code of Civil Procedure, Section 1204), the Trustee in Bankruptcy of Vensep, Inc. by virtue of the provisions of Section 67c(2) of the Bankruptcy Act would have succeeded to the lien rights of the Vensep employees whether or not an assignment had been made to Meyer and would have, by virtue of that succession, become entitled to all of the sales price of \$5,800.00.

X.

The Assignee Was Remiss in the Administration of His Trust and Is Therefore Subject to a Surcharge.

With the execution of the general assignment to him on May 29, 1957, Meyer, as assignee, became a trustee for the benefit of the creditors of Vensep, Inc. *Brainard v. Fitzgerald*, 3 Cal. 2d 157. Meyer should have determined the fact that as of the above date Vensep, Inc. was indebted to its employees for wages earned within ninety days of the assignment in the sum of \$7,662.85. In that connection it should be noted that Section 1204 of the Code of Civil Procedure imposes no requirement on the part of any employee to give notice to the assignee of the existence of his claim. Section 1204 provides only that the assignee shall have the right to require sworn claims to be presented, and, accordingly, places upon said assignee the duty of insisting, if he so desires, on the presentation of an attested claim.

The employees of Vensep, Inc. being the principal beneficiaries of Meyer's trust (Code of Civil Procedure, Section 1204; California Unemployment Insurance Code, Section 1702) California Revenue and Taxation Code, Section 6756) save perhaps for the United States (Revised Statutes, Section 3466; U. S. C. A., Title 31, Section 191) were entitled to the full proceeds which Meyer received for the on-sale liquor license. By virtue of his payments to the Department of Employment and Board of Equalization from the liquor license proceeds, Meyer breached his trust to the employee-beneficiaries.

Assuming, *arguendo*, that the Department of Alcoholic Beverage Control was cognizant of the wage liens of Vensep's employees when it required payment of the

subordinate claims of the Department of Employment and Board of Equalization, Meyer was under a legal duty to resist this determination and could have done so by resort to appropriate judicial process such as the writ of mandamus. California Government Code, Sec. 11523; *Covert v. State Board of Equalization*, 29 Cal. 2d 125; *Irvine v. State Board of Equalization*, 40 Cal. App. 2d 280.

“The rule is that when a trustee is in doubt, as to any matter arising in the execution of the trust, he may wait till a bill is brought (filed) against him, or he may bring a bill, seeking direction of the court.” Burrill, *Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors* at p. 504.

In fact, the Bankruptcy Act contemplates resort by an assignee to the courts by providing that an assignee shall not be surcharged for disbursements which are approved by a court of competent jurisdiction upon notice to creditors and other parties in interest. Section 2a(21), Bankruptcy Act.

The record is devoid of any evidence indicating that Meyer brought the fact of the existence of the wage liens to the attention of the Department of Alcoholic Beverage Control. In fact, the record supports the inference that Meyer did not. [Letter to Referee dated October 14, 1958, and particularly paragraph 3 thereof, Tr. of R. p. 34.] Since the presumption is that the official duty was regularly performed (Code of Civil Procedure, Section 1963 (15)) and since the Department of Alcoholic

Beverage Control insisted upon the payment of Vensep's obligations to the Department of Employment and State Board of Equalization, it must be assumed that the Department of Alcoholic Beverage Control was not cognizant of the existence of the wage liens.

By his failure to apprise the Department of Alcoholic Beverage Control of the existence of the wage liens, Meyer was negligent and by virtue of such negligence he became subject to surcharge. Burrill, *Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors*, page 504.

Appellant argues that by virtue of the terms of the assignment made to him by Vensep, Inc. he did not succeed to its on-sale liquor license but merely became Vensep's agent for the purpose of effecting a sale of the license. Appellant further argues that he, as assignee, succeeded only to the proceeds realized from his sale, as agent, of the liquor license in question. (Opening Brief of Appellant, pp. 26-27). Whether his capacity was that of agent for Vensep, Inc. or trustee for its creditors, Meyer was under a legal duty to secure the maximum possible return for the license upon its transfer and sale. This he failed to do.

XI.

Since an Assignee Voluntarily Assumes to Act There Is No Inequity in Denying Him Compensation and Reimbursement of Expenses Where the Estate Is Insufficient to Support Said Payments.

Under proper circumstances the general assignment for the benefit of creditors is a very salutary method of liquidating a debtor's estate. For his services to the creditors in the usual assignment an assignee is certainly entitled to reasonable compensation. However, the assignee's ". . . assumption of duty is voluntary. Before he evidences his consent he must determine from a reasonable aspect of the situation as it then appears whether a remuneration will accrue to him or not. He is the sole judge, under the circumstances, and must abide by the results, whether favorable to him or otherwise." *Division of Labor Law Enforcement v. Stanley Restaurants*, 228 F. 2d 420, 425.

Had Meyer chosen to heed the foregoing words, he could have determined at the time that Vensep, Inc. tendered the proposed assignment to him that the realizable assets would not exceed even those sums owed by Vensep, Inc. to its employees. It was inevitable from the foregoing that the employees of Vensep, Inc. in view of the paramount priority of the United States which existed under the assignment (Revised Statutes, Sec. 3466; U. S. C. A. Title 31, Sec. 191), had to resort, and did, to the Bankruptcy Act to protect their status and secure a reversal of the order of priority. Sections 64a(2) and (4), Bankruptcy Act. Accordingly, Meyer has no stand-

ing to complain of the surcharge imposed upon him for his actions in derogation of the rights of the employees of Vensep, Inc.

Conclusion.

Wherefore, Appellees and Cross-Appellants pray:

1. That that portion of the Order of the District Judge, dated March 27, 1959, denying the Trustee's motion to dismiss the petition for review of Appellant be reversed.

2. That the Order of the Referee, dated October 23, 1958, be affirmed.

3. That Appellees and Cross-Appellants recover of Appellant their costs on appeal.

Respectfully submitted,

QUITTNER, STUTMAN & TREISTER,

By HERMAN L. GLATT,

Attorneys for Irving I. Bass.

PAULINE NIGHTINGALE,

CONRAD LEE KLEIN, and

JOSEPH ABIHIDER,

By PAULINE NIGHTINGALE,

Attorneys for Division of Labor Law Enforcement.

